SUPREME COURT, U. S.

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No. 74-600

IN THE SUPREME COURT OF THE UNITED STATES

November Term, 1974

CARL LATURNER, et al,

Petitioner,

v.

BURLINGTON NORTHERN, INC., and BROTHERHOOD OF LOCOMOTIVE ENGINEERS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WILLIAM J. POWELL
BRYAN P. HARNETIAUX, Associate
1016 Washington Trust Bank Bldg.
Spokane, Washington 99204

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The petitioners, Carl LaTurner and 212 other locomotive engineers presently employed by respondent, Burlington Northern, Inc., pray that a Writ of Certiorari issue to review the opinion and judgement of the United States Court of Appeals for the Ninth Circuit, rendered in these proceedings July 17 and August 21, 1974.

OPINIONS BELOW

The "Findings of Fact and Conclusions of Law" and "Judgment" of William N. Goodwin, District Judge for the United States District Court, Eastern District of Washington, entered March 10, 1972, appear at Appendix "A", and Appendix "B", *post*, App. pp. A-1—A-16, B-1—B2.

The opinion of the United States Court of Appeals for the Ninth Circuit, reversing judgment for the petitioners herein, rendered July 17, 1974, appears at Appendix "C", *post*, App. pp C-1—C-32.

The Order of United States Court of Appeals for the Ninth Circuit denying Petition for Rehearing, entered August 21, 1974 appears at Appendix "D", *post*, App. p D-1. (official National Reporter citations unavailable at this time)

JURISDICTION

Subject matter jurisdiction for the court of first instance is based upon the Interstate Commerce Act, 49 U.S.C. 1, 5(2)(f), and related provisions, the Railway Labor Act, 45 U.S.C. 151 *et seq*, 28 U.S.C. 1331 and 1337.

The Order of the United States Court of Appeals for the Ninth Circuit, denying the Petition for Rehearing of its

Opinion was entered August 21, 1974. Appendix "D", *post*, App. p D-1. This Petition for Certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Were the 213 petitioners, as the District Court found, denied their statutory rights guaranteed by Section 5(2)(f) of the Interstate Commerce Act, as interpreted by this Court in *Norfolk and Western R. Co.* v. *Nemitz*, 404 U.S. 37 (1971), in that as a result of merger they were denied a "fair and equitable arrangment" and placed "in a worse position with respect to their employment?"

2. Did the Brotherhood of Locomotive Engineers violate its statutory duty of fair representation to petitioners, as most recently defined by this Court in *Vaca* v. *Sipes*, 386 U.S. 171 (1967)?

3. Did he Respondents violate the Constitution and By-Laws of the Brotherhood of Locomotive Engineers in consolidating engineers seniortiy rosters in the newly formed Pacific Seniority District on the basis of date of hire as a fireman?

4. Can the decision of the Ninth Circuit in this case be reconciled with the decision of the Fourth Circuit in *Cole* v. *Seaboard Coastline R. Co.*, 65 C.C.H. Lab. Cases, ¶11,567 (E.D. Va. 1970), *aff'd*, 64 C.C.H. Lab. Cases ¶11,499 (4th Cir. 1971) and the fifth Circuit's decision in *Price* v. *Seaboard Coastline Railroad Co.*, 332 F.Supp. 1093 (N.D. Ala. 1970), *aff'd per curiam*, 449 F.2d. 1371 (5th Cir. 1971)?

STATUTORY PROVISIONS INVOLVED

The following section of the Interstate Commerce Act, 49 U.S.C. 1 *et seq.* is relevant to this petition:

49 U.S.C. 5(2)(f) provides:

> "As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representatives of its or their employees."

The following sections of the Railway Labor Act, 45 U.S.C. 151 *et seq.* are relevant to this petition:

45 U.S.C. 151 FIRST provides:

> "When used in this chapter and section 225 of Title 28 and for the purposes of said chapter and section—
>
> First. The term "carrier" includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by

or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such "carrier": *Provided, however,* That the term "carrier" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso. The term "carrier" shall not include any company by reason of its being engaged in the mining of coal, the supplying of coal to a carrier where delivery is not beyond the mine tipple, and the operation of equipment or facilities therefor, or in any of such activities."

45 U.S.C. 151 SECOND provides:

"Second. The term "Adjustment Board" means the National Railroad Adjustment Board created by this chapter."

45 U.S.C. 151 FIFTH provides:

"Fifth. The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is conferred upon

it to enter orders amending or interpreting such existing orders: *Provided, however,* That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this chapter or by the orders of the Commission.

The term "employee" shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other than movement by rail with standard railroad locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple."

45 U.S.C. 151 SIXTH provides:

"Sixth. The term "representative" means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them."

The following section of the Railway Labor Act, 45 U.S.C. 151(a) is relevant to this petition:

45 U.S.C. 151(a) provides:

The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt

and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

The following section of the Railway Labor Act, 45 U.S.C. 152 FIRST is relevant to this petition:

45 U.S.C. 152 FIRST provides:

> First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

STATEMENT OF THE CASE

This Petition has as its genesis the 1970 merger of the Great Northern Railway Company (GN), the Northern Pacific Railway Company (NP) and three of their subsidiaries — the Pacific Coast Railroad Company, the Chicago, Burlington & Quincy Railroad Company and the Spokane, Portland & Seattle Railroad Company (SP&S). It evolves from an action instituted by a group of 213 dissatisfied employees who charged that the surviving carrier, Burlington Northern, Inc., (BN), and the Brotherhood of Locomotive Engineers (BLE), as the authorized bargaining representative for the craft of locomotive engineers, had discriminated against them arbitrarily, and invidiously in the negotiation and implementation of an agreement which established, *inter alia*, the method for consolidating certain of the predecesssor carriers' seniority rosters.

In early 1961, the above-mentioned rail carriers filed joint applications with the Interstate Commerce Commission, I.C.C. Finance Docket Nos. 21478-80, for authority pursuant to Section 5(2) of the Interstate Commerce Act, 24 Stat. 380, *as amended,* 49 U.S.C. Sec. 5(2), to merge the GN, NP. Pacific Coast and Burlington lines, and for the surviving carrier to lease the SP&S[1]. After extensive hearings on the application, and in spite of a favorable recommendation by the hearing examiner, the Commission initially refused to approve the merger, 328 I.C.C. 460 (1966). However, on January 4, 1967, the carriers' petition for reconsideration was granted, and shortly thereafter a second set of hearings were held. On November 30, 1967, the Commission reversed its earlier position and issued an order giving its authorization for the merger, 331 I.C.C. 228 (1967). There ensued numerous third-party requests for further reconsideration, and the Commission issued a series of orders, not pertinent here, in conjunction with those requests. In addition, several court actions were commenced in an attempt to overturn the agency's authorization. *See, e.g., United States* v. *United States,* 296 F.Supp. 853 (D.C.D.C. 1968). On March 3, 1970, the merger finally became effective by order of this Court. *United States* v. *Interstate Commerce Commission, (Northern Lines Merger Cases),* 396 U.S. 491 (1970).

After the issuance of the hearing examiner's recommended report and order, but while the merger proposal was still

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[1] For an historical analysis of the merger proceedings in this case, and a discussion of certain allied transactions not directly relevant here, *see* United States v. Interstate Commerce Commission (Northern Lines Merger Case) 396 U.S. 491 (1970).

pending before the Commission, the rail carriers entered into an agreement with the BLE to establish the job protections which would be accorded the union membership following the merger. This agreement, denominated the Merger Protective Agreement of June 29, 1965, guaranteed, *inter alia,* normal attrition and pre-merger wages for all locomotive engineers who had been employed on the predecessor lines. It also provided for subsequent negotiation by the carriers and the union of implementing agreements relating to the use of employees, rearrangement and changes in seniority districts, integration of seniority rosters in the consolidated seniority districts and other adjustments necessary to effect the merger.

This merger agreement contained the following statement of intent in Section 2(b):

> "This agreement is intended to provide a fair and equitable arrangement for the protection of the interests of the carriers' employees represented by the Brotherhood of Locomotive Engineers as provided in Section 5(2)(f) of the Interstate Commerce Act, as amended." (Joint Exhibit 1)

The merger agreement also contained its own "worse position" clause, setting forth guarantees in excess of those provided in Section 5(2)(f) of the Interstate Commerce Act. Section 2(c) of the Merger Agreement provided:

> "The new company will take into its employment all locomotive engineer employees (including all employees having seniority and equities as such) of Great Northern, Northern Pacific, Chicago, Burlington, Quincy and Spokane, Portland and Seattle as of the date of this agreement or subsequent thereto up to and including the final effective date of the commission order, *and none of these protected employees of the*

> *said Carriers shall be deprived of their employment status or placed in a worse position with respect to compensation, rules governing working conditions, fringe benefits or rights and privileges pertaining thereto at anytime during such employment.*" (Joint Exhibit 1) (emphasis added).

In January, of 1966, the rail carriers and the BLE entered into a second agreement, known as Implementing Agreement No. 1, which contained, in pertinent part, certain provisions for the consolidation of seniority districts throughout the merged railroad system. The Implementing Agreement established five consolidated seniority districts. At issue in this case is the newly-formed Pacific Seniority District. It also provided that the consolidated seniority rosters for each of the five new districts were to be prepared on a percentage allocation basis — *viz.* on the basis of a ratio which contrasted the total engine hours and car miles within the newly consolidated district with the total engine hours and car miles in each of the former seniority districts so combined. This formula is that mandated by Standing Rule 35 of the Constitution and By-Laws of the Brotherhood of Locomotive Engineers, 1966 edition (Joint Ex. 4).

The Merger Protective Agreement and Implementing Agreement No. 1 were canceled by the BLE, pursuant to their terms, following the Commission's initial decision to withhold its approval of the merger. However, in anticipation of receiving a more favorable ruling from the Commission on their petition for reconsideration the carriers entered into a third aggreement with the BLE on September 13, 1966. Under this third agreement, the two prior agreements were reinstated with several amendments, only one of which has particular relevance here. The pertinent

amendment to Implementing Agreement No. 1 reads in full as follows:

> Section 3 of Attachment B of Implementing Agreement No. 1 is amended to provide that in the event the interested General Committees agree on a different arrangement for an equitable consolidation of rosters for any of the new districts as outlined therein, and the New Company [BN] has no objection to such arrangement, then agreement will be entered into to cover such consolidation of rosters.

As amended, the September 13, 1966 Agreement expressly provided that the interested General Committees of the BLE could agree to establish a different method for equitably consolidating the seniority rosters in their respective districts. Absent objection by the various carriers, the method so chosen would then be incorporated into the post merger collective bargaining agreement executed by BN and the BLE.

During the interval in which the BN merger was temporarily inactive — between the initially adverse decision of the Commission and the execution of the September 13, 1966 Agreement — the delegates to the BLE convention had convened and extensively revised, effective July 19, 1966, that portion of the BLE Constitution which dealt with mergers and other related transactions. Standing Rule 35, as amended, provides:

> Seniority Districts
>
> Should it be, in the judgment of the officer assigned and the General Chairmen in the best interest of the members affected as a result of a merger, etc., to consolidate and/or merge a Seniority District or Districts, the General Chairmen shall consult with the Local Chairmen to work out a merger of the Districts and

seniority rosters which shall be made on an equitable basis, as follows:

> *In the preparation of seniority rosters to cover the Seniority Districts on an equitable basis, the General Chairman shall request the carrier to furnish promptly to him all statisitical information such as, but not limited to, number of trains, car miles, train miles, and yard engine hours and/or inbound car count for use in determining a proper ratio to govern the parties.*
>
> Should the General Chairman and affected Local Chairmen fail to agree, the matter shall be referred to the Grand Chief Engineer who shall make an investigation within thirty (30) days after which the Executive Committee of the G.I.D. [Grand International Division] shall make a determination which shall be final and binding. (emphasis added)

The previous Standing Rule 35, in effect from 1962 through 1966, was before the District Court as joint exhibit No. 3. In conjunction with certain of these standing rule changes, the Grand Chief Engineer of the BLE assigned one of the union's officers to coordinate the intra-union activities associated with the proposed BN merger. Among his duties, the officer was to assist the General and Local Chairmen in reaching a decision, pursuant to Standing Rule 35 and the September 13, 1966 Agreement, as to the method by which seniority rosters would be consolidated in the newly-formed districts.

In August of 1967, following numerous meetings among all interested parties, four proposals were offered to the Local Chairmen for their consideration; and. after further debate, a fifth and sixth proposal were added. On October 17, 1968, the General Chairmen of the NP, GN and SP&S sent a joint letter to the Local Chairmen requesting that each indicate his preference as to the consolidation method

which would be adopted in his district. Additional meetings were held, and the BLE's Executive Committee was consulted on a number of occasions regarding the various proposals. When the process was finally completed, a majority of the Local Chairmen in the Pacific District had voted to recommend the implementation of a date of hire method in their district. It was this recommendation which was ultimately incorporated into the BN-BLE post-merger collective bargaining agreement, dated February 19, 1970.

The present action, charging a violation of the Railway Labor Act, 45 U.S.C. Sec. 151 *et seq.*, and the Interstate Commerce Act, 49 U.S.C. Sec. 1 *et seq.*, was instituted by a group of locomotive engineers employed on the merged BN. In their prayer for relief, the Petitioners sought a declaratory judgment that the consolidated seniority roster for the Pacific District and the February 19, 1970 collective bargaining agreement between BN and the BLE were illegal, null and void. In addition, injunctive relief was requested to prohibit BN and the BLE from implementing the agreement and thereby utilizing a date of hire consolidated roster.

Following a trial on the merits, the district court held that the BN-BLE agreement of February 19, 1970, and in particular those provisions specifying that the seniority rosters in the Pacific Seniority Districts were to be consolidated using the engineers' date of hire as firemen, was contrary to the "clear and unambiguous" language of Standing Rule 35 of the BLE Constitution and therefore void. The court also held that by interpreting its constitution to permit a date of hire consolidation the BLE had breached its statutory duty of fair representation under the Railway Labor

Act, thus rendering the agreement and resulting seniority roster illegal and unenforceable. Finally, it held that in implementing the agreement the union had placed the Petitioners in a "worse position with regard to work opportunity" in violation of Section 5(2)(f) of the Interstate Commerce Act, 49 U.S.C. Sec. 5(2)(f), the intent of the I.C.C. order approving the merger, 331 I.C.C. 228 (1967), and the Merger Protective Agreement and Implementing Agreement No. 1. In ruling that the Respondents had violated Sec. 5(2)(f) of the Interstate Commerce Act, the District Court made the following Findings of Fact:

> "32. The resulting seniority roster which has been placed in use in the Pacific Seniority District was compiled by combining all of the names from the prior seven rosters in an order based strictly upon each individuals date of hire as a fireman. The testimony and the exhibits show that plaintiffs have lost seniority by adoption of this consolidated roster based upon a strict date of hire as firemen, and that engineers formerly employed by Northern Pacific and the SP&S have gained seniority. The Plaintiffs have not suffered any loss of wages or fringe benefits, due to the guaranteed wage provisions of the protective agreements between the B of LE and the carriers.
>
> 33. The Plaintiffs have, by loss of seniority, been required since the merger to work on less desirable jobs, that is, switch engineers instead of through runs on the mainline freights, and similar difficulties. Some Plaintiffs who formerly held daytime working assignments are no longer able to hold them are are *(sic)* obliged to work on night shifts due to their drop in seniority after the merger.
>
> 34. By reason of the adoption and implementation of the seniority roster based strictly on date of hiring as a fireman, the plaintiffs engineers in this case are not in the same relative standing or position with

regard to work opportunity as they were prior to the merger."

As a result of the following Findings of Fact, the trial judge entered *inter alia*, the following Conclusion of Law:

> "2. As a result of the agreement dated February 19, 1970 (Joint Exhibit 7) and the resulting engineer' seniority roster for the Pacific Seniority District based upon a strict date of hire method as firemen, the plaintiffs have been placed in a worse position with regard to work opportunity than they were in prior to the merger, in violation of the provisions of Section 5(2)(f) of the Interstate Commerce Act, and of the intent of the ICC order approving the merger, the Merger Protective Agreement and Implementing Agreement No. 1 enacted for the protection of plainiffs in conjunction with the merger."

A declaratory judgment was entered, and an injunction issued which prohibited BN and the BLE from giving effect to the February 19, 1970 agreement or utilizing a date of hire consolidated roster in the Pacific District. Upon appeal by respondents, the Court of Appeals for the Ninth Circuit stayed the injunction issued by the District Court pending review and ultimately reversed the trial court.

REASONS FOR GRANTING THE WRIT

I. "WORSE POSITION"

Once again this court has before it a case concerning the intent and scope of the "worse position" clause of Section 5(2)(f) of the Interstate Commerce Act. Earlier decisions by this court regarding this issue, spanning three decades, are *Railway Labor Executives' Association* v. *United States,* 339 U.S. 142 (1950); *St. Joe Paper Co.* v. *Atlantic Coast Line R. Co.,* 347 U.S. 298 (1954); *Brotherhood of Maintenance of Way Employees* v. *United States,* 366 U.S. 169 (1961) and *Norfolk and Western R. Co.* v. *Nemitz,* 404 U.S. 37 (1971).

This particular case involves a claim by 213 locomotive engineers that as a result of the implementation of a specific method for consolidating engineer's seniority rosters on the former lines, to effect the merger, the Petitioners were placed in a "worse position with regard to work opportunity." The District Court made specific findings to this effect. (App. "A", p A-10). The Petitioners in this case have not sought a determination that "job freeze" is the intendment of Section 5(2)(f) of the Interstate Commerce Act. That question was clearly settled in *Brotherhood of Maintenance of Way Employees, supra.* Rather, Petitioners have urged that under Section 5(2)(f) *and the applicable merger agreement provisions* they are entitled to placement on the post-merger consolidated seniority roster in the *same relative position* as that enjoyed on the respective pre-merger rosters. It is problematical as to whether Section 5(2)(f), standing alone, provides a sufficient basis for this claim, since the Merger Protective Agreement (Joint Ex. 1) governing the parties herein provided in pertinent part:

> ". . . . none of these protected employees of the said carriers shall be deprived of their employment status or placed in a worse position with respect to compensation, rules governing working conditions, fringe benefits or rights and privileges pertaining thereto at any time during such employment." (Sec. 2 (c) Joint Ex. 1).

Under the rule enunciated in *Nemitz* the above quoted clause became a condition of the Commision's approval of the consolidation, and its provisions are deemed to constitute a fair and equitable arrangement. 404 U.S. at 39. Thus the "worse position" test, enhanced by Section 2(c) of the Merger Agreement, involves more than monetary compensation — it pertains to employment status and work opportunity which translates into *seniority*.

This bargained-for agreement reflected the workers concern for protections in addition to monetary security. The District Court found that these protections were abrogated by the method ultimately used to consolidate rosters. The Circuit Court found these protections were not cognizable in this case yet recognized that in some instances protections of this nature "which do not speak directly to compensation may nevertheless be so intimately related to the compensatory protections guaranteed employees as to require their inclusion in a post-merger collective bargaining agreement." (Slip Opinion p. 25).

The ultimate method selected by the Respondents was found by the District Court to be at odds with the merger agreement before the Interstate Commerce Commission. The record in this case clearly reflects the inequities with respect to work opportunity visited upon these petitioners. This court should determine the extent to which the parties

to a merger collective bargaining agreement are bound by the assurances contained therein concerning the laborer's non-compensatory rights. Petitioners suggest this case is the logical result of the doctrine announced in *Norfolk and Western R. Co.* v. *Nemitz, supra.*

A second closely related problem present in this case with respect to Section 5(2)(f) of the Interstate Commerce Act is the question of whether the Respondents "abrogated" prior specific agreements before the ICC. The Court of Appeals decision directly confronts this inquiry. The problem arises out of the fact that in addition to the "worse position" clause contained in the merger protective agreement[2], the Respondents entered into "Implementing Agreement No. 1" (Joint Ex. 2) which provided for integration of pre-merger seniority rosters in *all* seniority districts on the basis of "proration of work.[3] After initial denial of the merger this agreement was cancelled and later reinstated by the Respondents, the later act being accomplished by the Agreement of September 13, 1966. (Joint Ex. 6). The September 13, 1966 agreement reinstated Implementing Agreement No. 1 except that instead of being required to consolidate rosters on the basis of percentage of work done, the various seniority districts were now at liberty to use any other method the particular General Com-

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[2]Section 1(b) of the Merger Protective Agreement required the Carrier to supply statistics on work performed on the various lines. This data is that required by Standing Rule 35.

[3]As will be seen it is this method of consolidation which Petitioners contend and the District Court found is mandated by Standing Rule 35 of the Constitution and By-Laws of the Brotherhood of Locomotive Engineers.

mittees agreed on for the equitable consolidation of rosters so long as the Carrier's approval was obtained.

It is questionable as to exactly what agreements were before the ICC. The record indicates affirmatively that the Merger Protective Agreement was but it is unclear whether the remaining two agreements were considered. *See,* 331 I.C.C. 228 (1967); (Tr. 231-32). In *Nemitz* this Court held:

> "An agreement made pursuant to the last sentence of Sec. 5(2)(f) may vary the protections afforded by the I.C.C. order, but it may not substantially abrogate employees' rights grounded in an I.C.C. order. 404 U.S. 42-43.

This Court should determine whether the protections afforded petitioners were substantially abrogated in that the ultimate method of consolidation implemented in the Pacific Seniority District was inequitable or one other than that contemplated by the Interstate Commerce Commission.

II., III., IV. "FAIR REPRESENTATION"; STANDING RULE 35

In this Court's most recent pronouncement on the duty of fair representation the doctrine was etched in the following terms:

> "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is *arbitrary, discriminatory or in bad faith." Vaca* v. *Sipes,* 386 U.S. 171 (1967) (emphasis added).

The Ninth Circuit, in an unrelated opinion, has viewed *Vaca* v. *Sipes,* as reflecting a "calculated broadening of the fair representation standard" in comparison with earlier opinions from this court holding the graveman of the action is hostile discrimination or bad faith. *See, Retana* v. *Apart-*

ment, Motel, Hotel & El. Op. Union, Local 14, 453 F. 2d 1018, 1053 fn. 8 (1972). Other circuits have maintained the rigid pre-*Vaca* standards. *Schick* v. *NLRB*, 409 F. 2d 395 (7th Cir. 1969). There exists yet a third body of cases which appear to dichotomize the fair representation duty, applying more stringent standards (arbitrary and capricious) in the grievance and arbitration context while applying the more traditional approach in collective bargaining situations. *See, DeArroyo* v. *Sindicato de Trabajatores Packing House*, 425 F. 2d 281 (1st. Cir. 1970); *Bazarte* v. *United Transportation Union*, 429 F. 2d 868 (3rd. Cir. 1970); *Griffin* v. *United Automobile Workers*, 81 LRRM 2485 (4th. Cir. 1972); *Dill* v. *Greyhound Corp.*, 435 F. 2d 231 (6th Cir. 1970).

This variance alone provides a sufficient basis for consideration of Petitioners' writ.

In this particular case the Petitioners claimed the duty of fair representation was violated in that:

1.) the method of consolidating seniority rosters in this case was clearly inequitable;

2.) a violation of the "worse position" clause applicable in this case consituted a denial of fair representation; and

3.) the Respondents violated the organic law[4] of the Brotherhood of Locomotive Engineers in consolidating the seniority rosters in the newly formed Pacific Seniority Districts on a basis other than proration of work.

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[4]Standing Rule 35, Constitution and By-Laws of the BLE.

Petioners' position with respect to items 1 and 2 listed above has been previously set forth. The critical error of the Circuit Court pertains to the third claim. The district court found that Standing Rule 35 was plain and unambiguous in requiring that:

> "[i]n the *preparation of seniority rosters* to cover the Seniority Districts *on an equitable basis,* the General Chairmen *shall request the carrier to furnsh promptly* to him all statistical information such as, but not limited to, number of trains, car miles, train miles, and yard engine hours and/or inbound car count *for use in determining a proper ratio to govern the parties.*" (emphasis added).

Standing Rule 35 presupposes the use of a *ratio* in consolidating *rosters* and it is beyond dispute that this was not done. The Respondents simply combined *men,* not *rosters.* It is this distinction that makes the Circuit Court's reliance upon the fact that date of hire is a generally acceptable formula immaterial. The point that eluded the Circuit Court is that Standing Rule 35 governs (and mandates) consolidation of *rosters,* and leaves the question of how *men* are dovetailed into the newly formed roster to the various lines involved in the merger. Under Standing Rule 35 the roster is established by determination of the work done on each former line. The requirement that a ratio be established arises out of the plain language of the rule. That some type of ratio is contemplated is further evidenced by the "Convention Proceedings" of the BLE (Joint Ex. 5), and the reference to how Standing Rule 35 read prior to its revision at the 1966 convention. The prior rule simply left the method of consolidation up to a referendum vote of the membership.

Again, the distinction that exists in Standing Rule 35 is the difference between combining seniority *rosters* and the process of actually inserting the *men* into the consolidated rosters. These are two separate and distinct processes. Standing Rule 35 establishes the procedure for combining existing rosters (on the former divisions). This is done on the basis of the work performed in the past by each division. Standing Rule 35 does not compel the individual (former) divisions to arrange their roster, for purposes of dovetailing into the consolidated roster, in any particular way. Thus, once the ratio is established by use of the statistical information, each (former) division is at liberty to arrange its men, for the purpose of dovetailing into the consolidated roster, by any method it chooses. This second step may then be accomplished by the different divisions in different manners. One division may use date of hire as a fireman, another date of hire as an engineer, and yet another according to the relative height of its members. The point is that Standing Rule 35 does not mandate that the intramural hierarchy of the (former) divisions be established by any particular process. Rather, Standing Rule 35 requires that a ratio be established for determining how the rosters of the (former) divisions should be combined.

What the Respondents did in this case was omit the process of establishing the ratio mandated by Standing Rule 35 and simply decided to consolidate *men,* thereby ignoring the separate process clearly required with respect to *rosters.* There is a vital difference here. Petitioners do not contend that Standing Rule 35 prohibits date of hire as a method of determining how each (former) divisions roster is to

be arranged for purposes of dovetailing into the new consolidated roster.

To demonstrate the distinction the following oversimplified illustration is offered:

A.) As a result of the ratio formula it is determined that the rosters of three former divisions will be consolidated as follows: Division A did twice as much work as Divisions B and C so for every one man from Division B and C dovetailed into the consolidated roster two men from A will be inserted —thus as the division *slots* are dovetailed in the consolidated roster will look like this:[5]

CONSOLIDATED ROSTER

Slot #1 A
Slot #2 A
Slot #3 B
Slot #4 C
Slot #5 A
Slot #6 A
Slot #7 B
Slot #8 C
et cetera

The use of this ratio then fulfills the requirements of Standing Rule 35

B.) As to the names to be plugged into each divisions slots it matters little, insofar as Rule 35 is concerned, on what basis the rosters of Divisions A, B and C are established. A may use date of hire, B may

[5]Each slot to be filled by one employee of that division.

use work hours performed and C may compose their roster on the basis of the relative deportment of each member.

The point is that two independent processes are involved and that in this case one process was completely ignored.

This Court should review the Court of Appeals decision in this case because the effect of the ruling is to re-write Standing Rule 35. Petitioners' urge that the Court's error is compounded by the fact that in finding as it did a conflict has been created in various circuits as to the intent and meaning of Standing Rule 35. In *Price* v. *Seaboard Coastline Railroad Co.*, 332 F. Supp. 1093 (N.D. Ala. 1970), *aff'd per curiam* 449 F. 2d 1371 (5th Cir. 1971) and *Cole* v. *Seaboard Coastline Railroad Co.*, 65 C.C.H. Lab. Cases, para. 11,567 (E.D. Va. 1970), *aff'd* 64 C.C.H. Lab. Cases, para. 11,499 (4th Cir. 1971)[6] both circuits held Standing Rule 35 provided for the "exclusive method" for consolidating rosters and required the use of the statistical information contained therein.[7] These cases, like this one, involved the Brotherhood of Locomotive Engineers. *Price* and *Cole* are at odds with the Circuit Court's opinion and it is necessary for this court to resolve decisively the issue of what are the requirements of Standing Rule 35.

The bedrock of an organized laborer's rights is the organic law of his union. If the Union representatives are at

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[6]*See also, Witherspoon* v. *Grand International Bro. of Locomotive Engineers*, 194 S.E. 2d 399 (S. Car. 1973).

[7]It is worthy of note that both *Cole* and *Price* also dealt with claims of enginemen being in a worse position with respect to work opportunity.

liberty to ignore the requirements of the Union Constitution then the membership's rights are illusory. The two lower courts have disagreed on the meaning of Standing Rule 35. The fourth and fifth circuits' decisions appear to conflict with that of the Ninth Circuit. If Standing Rule 35 was in fact violated, as Petitioners urge, then the Respondent BLE violated its duty of fair representation.

CONCLUSION

This case presents this Court with an opportunity to clarify the law with respect to two critical aspects of federal labor law — the "worse position" doctrine arising out of mergers governed by the Interstate Commerce Act, and the doctrine of fair representation. The importance of clearly delineating these two areas is evident in light of the prevalence of mergers today in railroad, airline and other closely regulated industries.

On the basis of the foregoing it is respectfully requested that this Court issue a Writ of Certiorari in this case.

Respectfully submitted:

WILLIAM J. POWELL

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APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

CARL LATURNER, *et al.*,
Plantiff,

v.

BURLINGTON NORTHERN, INC., and BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Defendants.

No. 3379
FINDINGS OF FACT AND CONCLUSIONS OF LAW
(R. 132-142)

THIS ACTION having been tried before the Court and the Court having duly considered the evidence and having filed its Memorandum Opinion herein and being fully advised in the premises, now makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Defendant Burlington Northern, Inc., is a Deleware corporation and is a common carrier by rail, operating interstate. It is the successor since March 3, 1970 of five predecessor carriers, namely Great Northern, Northern Pacific, Pacific Coast, Chicago, Burlington & Quincy, and Spokane, Portland & Seattle.

2. Defendant Brotherhood of Locomotive Engineers is an unincorporated association and labor organization, national in scope, certified under the Railway Labor Act as the collective bargaining representative for all locomotive

engineers employed by Defendant Burlington Northern and its predecessor lines.

3. There are 213 plaintiffs in this action, all of whom are employed by Defendant Burlington Northern, Inc., as locomotive engineers. Of said 213 plaintiffs, 168 were formerly employed by the Great Northern, Spokane Tenth Division, and the remaining 45 plaintiffs were formerly employed by the Northern Pacific, Idaho West Division, with home terminal at Pasco, Washington.

4. Both of the Defendants do business within the Eastern District of Washington, and all of the plaintiffs reside within the Eastern District of Washington.

5. Some of the Plaintiffs are members of Defendant Brotherhood of Locomotive Engineers and other plaintiffs are members of the Firemen's organization, a division of the United Transportation Union. For purposes of collective bargaining however all of the plaintiffs are represented by the Brotherhood of Locomotive Engineers as the exclusive bargaining representative for rates of pay, rules and working conditions for the craft of locomotive engineers on the Defendant railroad and its predecessor lines.

6. Prior to the merger, the predecessor railroads were each divided into a considerable number of operating divisions, each of which had separate seniority rosters for employees. In conjunction with the merger, the merged railroad was divided into five new seniority districts, of which we are here concerned with the Pacific Seniority District which extends from terminals at Troy, Montana and Paradise, Montana on the East to the Pacific Ocean in Wash-

ington and Oregon on the West. The formation of the new Pacific Seniority District involved the merging or combining of seven separate seniority rosters, as follows:

(1) Great Northern Spokane Tenth Division (home terminal, Spokane) 174 men;

(2) Great Northern Eleventh Division (home terminal, Seattle) 189 men;

(3) Northern Pacific Tacoma East Division (home terminal, Auburn, Wn.) 130 men;

(4) Northern Pacific Tacoma West Division (home terminal, Tacoma 80 men;

(5) Northern Pacific Idaho East Division (home terminal, Spokane) 108 men;

(6) Northern Pacific Idaho West Division (home terminal, Pasco) 114 men;

(7) Spokane, Portland & Seattle System (various terminals) 188 men.

7. To become a locomotive engineer, an individual must first have been employed on a railroad as a fireman. Two prerequisites are necessary to promotion from firemen to engineer, namely work as a fireman for a specified minimum period of time, and successful completion of a standard examination for locomotive engineers. Upon fulfillment of these prerequisites, a man is then "set up" on the locomotive engineers seniority roster. An employee "set up" on the engineer's roster does not lose his status on the firemen's roster. Once an employee is "set up" he earns the right to work as a locomotive engineer; how soon or how often he works in that capacity is dependent upon his rank on the engineer's roster and on the needs of the particular railroad carrier. Until the individual attains some sufficient seniority status on the engineer's roster to claim

fulltime work as an engineer, he may be subject to "ebb and flow", namely being "cut back", from engineer's work to firemen's work due to inability to claim any available engineer's job. "Cut backs" can also occur during periods of reduction of service, and the reverse also occurs. As a consequence, all locomotive engineers are also carried on the firemen's roster, and there are a total of 1099 names available to be placed on both engineer's and firemen's rosters in the new Pacific Seniority District of the Burlington Northern.

8. The merger proceeding commenced in February 1961, when the Great Northern, Northern Pacific, Pacific Coast, Chicago, Burlington & Quincy and Spokane, Portland and Seattle filed joint applications with the Interstate Commerce Commission in Finance Docket Nos. 21478-80, asking the Commission for authority under Section 5(2) of the Interstate Commerce Act (49 USC, Sec. 5(2)) to merge the first four railroads above mentioned and for the resulting company to lease the Spokane, Portland & Seattle, to control subsidiaries, to issue common stock, to assume obligations and liabilities, to abandon and construct certain lines and to do other things related to and necessary for the effectuations of the mergers and lease. Section 5(2)(a) prohibited consummation of the transaction without approval of the Interstate Commerce Commission. Section 5(2)(b) of the statute provided for Commission approval of the transaction if the Commission found it to be just and reasonable and consistent with the public interest, subject to such terms and conditions and modifications as the Commission should find to be just and reasonable.

9. Section 5(2)(f) of the Statute required as a condi-

tion of approval of the transaction that the Commission should require a fair and equitable arrangement to protect the interests of the railroad employees affected. Section 5(2)(f) of the Statute reads as follows:

> "As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval, the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. *Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.*" (Emphasis supplied).

10. On August 24, 1964, Hearing Examiner Murphy, in his recommended report and order, recommended the approval of the merger to create defendant Burlington Northern. On March 31, 1966, the Interstate Commerce Commission denied the application for the merger. On June 27, 1966, the applicants filed a petition for reconsideration of the order dated March 31, 1966. On January 4, 1967, the Interstate Commerce Commission granted the petition

for reconsideration and held additional hearings. On November 30, 1967, the Interstate Commerce Commission granted authority for the merger. Following this date, there were many requests for reconsideration and many additional orders issued by the Interstate Commerce Commission. On May 2, 6 and 9, 1968, court actions were filed to challenge the merger. On March 3, 1970, by order of the United States Supreme Court, the merger became effective. March 3, 1970, is commonly referred to as "M-Day".

11. Following the recommended report and order of the hearing examiner, but while the merger proposal was still pending before the Interstate Commerce Commission, and in anticipation of ICC approval of the proposed merger, the five rail carriers entered into an agreement with defendant Brotherhood of Locomotive Engineers on June 29, 1965, denominated Merger Protective Agreement. (Joint Exhibit 1)

12. The Merger Protective Agreement of June 29, 1965, provided among other things, for guaranteed earnings and employment for all locomotive engineers on the predecessor companies and also provided for subsequent negotiation of implementing agreements between the rail carriers and the defendant Brotherhood of Locomotive Engineers relating to the use of employees, the allocation and rearrangement of forces, rearrangement and changes in seniority districts, merger of engineer seniority rosters in the consolidated seniority districts, and other adjustments necessary for the proper functioning of the merged system.

13. Subsequently, on January 21, 1966, the five rail car-

riers and defendant Brotherhood of Locomotive Engineers entered into a second agreement denominated "Implementing Agreement No. 1." (Joint Exhibit 2)

14. Implementing Agreement No. 1 contained, among other things, provisions for the consolidation of the former seniority districts throughout the merged railroad system, except those seniority districts on the former Chicago, Burlington & Quincy Railroad Company, into five newly established seniority districts, which were denominated "Lake Superior District," "Minnesota District," "Montana Dakota District," "Rocky Mountain District," and "Pacific District."

15. Implementing Agreement No. 1 further provided in Article I, Section 3 thereof, that the new seniority rosters for the proposed new seniority districts should be prepared on a basis of the relationship of total engine hours and car miles in the consolidated districts to the total engine hours and car miles of each former seniority district thereby producing a seniority rearrangement equitable to the employees involved.

16. On March 31, 1966, the Interstate Commerce Commission disapproved the appplication for merger by the rail carriers.

17. The effective date of the Merger Protective Agreement and the Implementing Agreement had been mutually extended to June 1, 1966, and on or about that date defendant Brotherhood of Locomotive Engineers, through its general chairman, notified the various rail carriers that since the Interstate Commerce Commission had failed to approve the proposed merger the Brotherhood of Locomo-

tive Engineers was cancelling the Merger Protective Agreement and Implementing Agreement No. 1, in accordance with the provisions of those agreements.

18. In anticipation of a more favorable determination by the Interstate Commerce Commission of the merger application on the petition for reconsideration, the five rail-carriers and defendant Brotherhood of Locomotive Engineers entered into an agreement on September 13, 1966, hereafter denominated "Reinstatment and Amendatory Agreement." (Joint Exhibit 6).

19. Reinstatement and Amendatory Agreement (Joint Exhibit 6) provided that the Merger Protective Agreement and Implementing Agreement No. 1 would again be in full force and effect except that Section 3 of Attachment B of Implementing Agreement No. 1 was amended to provide that in the event the interested General Committees agree on a different arrangement for an equitable consolidation of rosters for any of the new seniority districts, and the new company had no objections to such arrangements, then agreement would be entered into to cover such consolidation of rosters.

20. On February 19, 1970, the new company defendant Burlington Northern, Inc., and defendant Brotherhood of Locomotive Engineers, through its General Chairmen, entered into a further Implementing Agreement (Joint Exhibit 7), providing for the consolidation of the Engineers' Seniority Rosters in the merged seniority districts. The consolidated seniority districts and engineers' seniority rosters, therefore, were placed into effect on the effective date of the merger, March 3, 1970.

21. The merger Seniority Agreement provided that three of the five new seniority districts, namely, Lake Superior, Minnesota and Montana-Dakota would merge former engineer seniority rosters on the basis of "Consolidated Seniority Equities Per Attachment B of Implementing Agreement No. 1." It further provided that in the remaining two new seniority districts, Rocky Mountain and Pacific, that engineers' seniority rosters would be "dove-tailed on a basis of hiring date." The hiring date referred to in the February 19, 1970 agreement was the hiring date of the employee as a *fireman* on the former line.

22. Officers of Division 576 of the BLE filed in writing with defendent BLE certain purported appeals to the Grand Chief Engineer of the BLE under the Constiution and By-Laws of said defendant relative to the merging of the seniority rosters, and such officers of Division 576 were informed that the consolidation of seniority rosters had been carried out to finality in accordance with the terms of the merger agreements and the internal laws of the Brotherhood, and from which there is no provision for appeal under the Constitution and By-Laws of the BLE.

23. On July 19, 1966, in convention duly assembled, defendant Brotherhood of Locomotive Engineers amended the organization's Standing Rule 35(d) to its present language, which reads as follows:

> "Should it be, in the judgment of the officer assigned and the General Chairman in the best interest of the members affected as a result of a merger, etc., to consolidate and/or merge a Seniority District or Districts, the General Chairman shall consult with the affected Local Chairmen to work out a merger of

the Districts and seniority rosters which shall be made on an equitable basis, as follows:

In the preparation of seniority rosters to cover the Seniority Districts on an equitable basis, the General Chairman shall request the carrier to furnish promptly to him all statistical information such as, but not limited to, number of trains, car miles, train miles, and yard engine hours and/or inbound car count for use in determining a proper ratio to govern the parties.

Should the General Chairman and affected Local Chairmen fail to agree, the matter shall be referred to the Grand Chief Engineer who will make an investigation within thirty (30) days after which the Executive Committee of the G.I.D. shall make a determination which shall be final and binding."

24. Prior to the Burlington Northern merger, each of the predecessor lines had a local organization of the Brotherhood of Locomotive Engineers which generally, but not always, coincided with the operating divisions of the various railroads. Each local organization elected a local committee of adjustment, headed by a man denominated "local chairman" whose duty it was to negotiate local matters with the carrier involved. On each former railroad in turn, the local committees of adjustment elected a general committee of adjustment represented by a "general chairman", whose duty it was to negotiate system wide matters with the carrier. The Burlington Northern merger involved for the BL of E, four general chairmen, namely, Mr. Kempf (later Mr. Spangler) for the Great Northern; Mr. Bichsel for the Northern Pacific; Mr. Dunnigan for the SP&S and Mr. Salee for the CB&Q.

25. In what was to become the Pacific Seniority District, there were seven local divisions on three carriers involved, represented by ten local chairmen, namely, two

Great Northern Divisions, represented by two local chairmen, four Northern Pacific divisions represented by five local chairmen and one SP&S Division represented by three local chairmen.

26. To assist the general chairmen and local chairmen in obtaining agreement for protective conditions for the employees incident to the merger, and in obtaining intra-union agreement concerning the consolidation of seniority rosters, the Grand Chief Engineer of the BLofE assigned an Assistant Grand Chief Engineer, Mr. L. S. Loomis, to work with the general chairmen and to facilitate the negotiations.

27. Originally, the general chairmen and the assistant grand chief engineer submitted four proposals to the local chairmen representing the seven seniority districts in the Pacific Division. These proposals presented a percentage block plan, a date of hire with prior rights plan, and a plan that included matching engineers according to their seniority on their respective rosters.

28. The general chairmen and the assistant grand chief engineer held meetings with local chairmen in Seattle, Spokane and Pasco. Subsequent to these meetings and the presentation of these four proposals, one or more local chairmen from the Northern Pacific and one from the Seattle Division of the Great Northern sent an inquiry to the General Chairmen and the Assistant Grand Chief Engineer asking if a strict date of hire method could be used to consolidate rosters.

29. Section 7(b) of the Constitution of the Brotherhood of Locomotive Engineers empowers the Grand Chief En-

gineer with the authority to "render interpretations of the law of the B of LE".

30. The Grand Chief Engineer was asked for an interpretation, and he responded to the General Chairmen that the Constitution and By-Laws prohibited the use of a strict date of hire as firemen, method for consolidating engineers seniority rosters. At a later date, the Grand Chief Engineer reversed himself and sent a communication to the general chairmen in which he approved the use of a strict date of hire method to consolidate engineers seniority rosters. No approval or no vote had been solicited from the local chairmen with respect to the first four plans.

31. Now a new plan was proposed to the ten local chairmen representing the seven seniority rosters. This strict date of hire plan was approved by a majority of the local chairmen and made a part of the implementing agreement between the merged railroads and the Brotherhood of Locomotive Engineers. The date of hire plan adopted was more favorable to the engineer employees of the SP&S and Northern Pacific railway than any of the other proposals.

32. The resulting seniority roster which has been placed in use in the Pacific Seniority District was compiled by combining all of the names from the prior seven rosters in an order based strictly upon each individuals date of hire as a fireman. The testimony and the exhibits show that plaintiffs have lost seniority by adoption of this consolidated roster based upon a strict date of hire as fireman, and that engineers formerly employed by Northern Pacific and the SP&S have gained seniority. The plaintiffs

have not suffered any loss of wages or fringe benefits, due to the guaranteed wage provisions of the protective agreements between the B of LE and the carriers.

33. The Plaintiffs have, by loss of seniority, been required since the merger to work on less desirable jobs, that is, switch engineers instead of through runs on the mainline freights, and similar difficulties. Some Plaintiffs who formerly held daytime working assignments are no longer able to hold them and are obliged to work on night shifts due to their drop in seniority after the merger.

34. By reason of the adoption and implementation of the seniority roster based strictly on date of hiring as a same relative standing or position with regard to work fireman, the plaintiffs engineers in this case are not in the opportunity as they were prior to the merger.

35. The Court finds that there is no ambiguity in the language of Standing Rule 35D of the Constitution of the Brotherhood of Locomotive Engineers. The Court further finds from examining the proceedings at the Convention which adopted Standing Rule 35D, that it was the intent of the delegates to approve a rule change to expedite mergers but to require the use of certain stated facts and statistical data in the preparation of a formula that would do equity to the members involved in the formulation of consolidated seniority rosters.

36. The Court finds that the action of the Grand Chief Engineer and the General Chairmen in implementing the basic agreement by incorporating the strict date of hire method for merging the Pacific Seniority District Engineers Seniority Rosters on a strict date of hire method as

firemen was arbitrary and capricious and contrary to the plain and unambiguous terms of the Brotherhood's Standing Rule D.

From the foregoing Findings of Fact, the Court makes the following

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the parties and of the subject matter of this action under the provisions of the Interstate Commerce Act, 49 U.S.C., Sec. 1 et seq., the Railway Labor Act, 45 U.S.C., Sec. 151 et seq., 28 U.S.C. Secs. 1331 and 1337, and the doctrine of pendent jurisdiction.

2. As a result of the agreement dated February 19, 1970 (Joint Exhibit 7) and the resulting engineers' seniority roster for the Pacific Seniority District based upon a strict date of hire method as firemen, the plaintiffs have been placed in a worse position with regard to work opportunity than they were in prior to the merger, in violation of the provisions of Section 5(2)(f) of the Interstate Commerce Act, and of the intent of the ICC order approving the merger, the Merger Protective Agreement and Implementing Agreement No. 1 enacted for the protection of plaintiffs in conjunction with the merger.

3. The agreement of February 19, 1970 and the resulting consolidated seniority roster for engineers in the Pacific Seniority District, based strictly upon date of hire as a fireman is contrary to the clear and unambiguous provisions of Standing Rule 35D of the Constitution of the Brotherhood of Locomotive Engineers, and as such is be-

yond the power of said Brotherhood of Locomotive Engineers to enter into or to contract for, and is therefore void.

4. The arbitrary interpretation of Standing Rule 35D by the Brotherhood of Locomotive Engineers violates the Brotherhood's statutory duty of fair representation under the provisions of the Railway Labor Act, 45 U.S.C., Sec. 151 et seq., and the agreement of February 19, 1970 (Joint Exhibit 7) and the resulting hiring date seniority roster for Pacific Seniority District No. 5 formulated thereby are therefore illegal, void and unenforceable.

5. Plaintiffs are therefore entitled to a declaratory judgment finding that the agreement of February 19, 1970 and the resulting "Hiring Date" Engineers' Seniority Roster in the Pacific Seniority District of Burlington Northern, Inc., are illegal and null and void.

6. Plaintiffs are further entitled to an injunction prohibiting defendants from carrying out the terms of said agreement of February 19, 1970 in Pacific Seniority District No. 5, and further prohibiting the use of a consolidated engineers seniority roster in said seniority district which is solely based upon the employees' date of hire as a fireman. The implementation of the foregoing injunction shall be stayed for a period of sixty days from this date to enable defendants, if they choose, to apply for relief before the Court of Appeals for the Ninth Circuit.

7. Plaintiffs shall further be entitled to their taxable costs and disbursements herein.

Done by the Court at Tacoma, in said District, this 10th day of March, 1972.

s / WILLIAM N. GOODWIN
United States District Judge

Presented by:
s / WILLIAM J. POWELL
Attorney for Plaintiffs

Copy Received:
Attorney for Defendant Burlington Northern

s / WM. F. NIELSEN
Attorney for Defendant Brotherhood

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

CARL LATURNER, *et al.*,
Plaintiff,
v.
BURLINGTON NORTHERN, INC., and BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Defendants.

No. 3379

JUDGEMENT

THIS MATTER having been tried before the Court and the Court having filed herein its Written memorandum decision, and having further filed its Finding of Fact and Conclusions of Law, directing the entry of judgement in favor of Plaintiffs, and against the Defendants, it is

ORDERED AND ADJUDGED as follows:

1. It is adjudged that the Agreement of February 19, 1970 and the resulting hiring date as firemen engineers' seniority roster in Pacific Seniority District No. 5 are illegal and null and void.

2. Defendants Burlington Northern, Inc., and Brotherhood of Locomotive Engineers are hereby permanently enjoined and restrained from carrying out the terms of the illegal agreement of February 19, 1970 in Pacific Seniority District No. 5, and are further enjoined and restrained from the use of a consolidated engineers' seniority roster in said

seniority district which is based upon the employees date of hire as a fireman.

3. The implementation of the foregoing injunction shall be stayed for a period of sixty days from this date to enable defendants, if they choose, to apply for relief before the Court of Appeals for the Ninth Circuit.

4. Plaintiffs shall be awarded their taxable costs and disbursements herein.

Done by the Court at Spokane, in said District, this 10th day of March, 1972.

_____

United States District Judge

Presented by:

_____

WILLIAM J. POWELL
Atttorney for Plaintiffs

Approved, Copy Received:

_____

Attorney for Defendant Burlington Northern

_____

Attorney for Defendant
Brotherhood of Locomotive Engineers

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CARL LATURNER, *et al.*, *Appellee,* v. BURLINGTON NORTHERN, INC., and BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *Appellants.*	No. 72-1576 OPINION

Appeal from the United States District Court
for the Eastern District of Washington,
Northern Division

Before: CHAMBERS and SNEED, Circuit Judges,
BURNS*, District Judge.

SNEED, Circuit Judge:

This appeal has as its genesis the 1970 merger of the Great Northern Railway Company (GN), the Northern Pacific Railway Company (NP) and three of their operating subsidiaries — the Pacific Coast Railroad Company, the Chicago Burlington & Quincy Railroad Company and the Spokane, Portland & Seattle Railroad Company (SP &S). It evolves from an action instituted by a group of dissatisfied employees who charged that the surviving carrier, Burlingon Northern, Inc. (BN), and the Brotherhood

*Honorable James M. Burns, District Judge, Western District of Oregon, sitting by designation.

of Locomotive Engineers (BLE), as the authorized bargaining representative for the craft of locomotive engineers, had discriminated against them for hostile and invidious purposes in the negotiation and implementation of an agreement which established, *inter alia,* the method for consolidating certain of the predecessor carriers' seniority rosters.

FACTS

In early 1961, the above-mentioned rail carriers filed joint applications with the Interstate Commerce Commission, I.C.C. Finance Docket Nos. 21478-80, for authority pursuant to Section 5(2) of the Interstate Commerce Act, 24 Stat. 380, *as amended,* 49 U.S.C. §5(2), to merge the GN, NP, Pacific Coast and Burlington lines, and for the surviving carrier to lease the SP&S.[1] After extensive hear-

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[1]Section 5(2) of the Interstate Commerce Act establishes certain requirements which control the merger of common carriers. Under Section 5(2)(a), the consummation of a merger and its related transactions is prohibited without the prior approval of the Commission. Section 5(2)(b) provides, *inter alia* that, subject to such terms, conditions and/or modifications as it shall find to be just and reasonable, the Commission must determine that the merger is consistent with the public interest. Sections 5(2)(c)-(e) provide criteria for the Commission in making such a determination, and authority for it to require certain modifications of the merger proposal as a condition of its approval. Pursuant to Section 5(2)(f), *see infra* at n. 25, approval is also conditioned on the Commission's having insured a fair and equitable arrangement to protect the interests of the employees who are affected by the merger.

For an historical analysis of the merger proceedings in this case, and a discussion of certain allied transactions not directly relevant here, *see* United States v. Interstate Commerce Commission (Northern Lines Merger Cases), 396 U.S. 491 (1970).

ings on the application, and in spite of a favorable recommendation by the hearing examiner, the Commission initially refused to approve the merger, 328 I. C. C. 460 (1966).[2] However, on January 4, 1967, the carriers' petition for reconsideration was granted, and shortly thereafter a second set of hearings were held. On November 30, 1967, the Commission reversed its earlier position and issued an order giving its authorization for the merger, 331 I.C.C. 228 (1967). There ensued numerous third-party requests for further reconsideration, and the Commission issued a series of orders, not pertinent here, in conjunction with those requests. In addition, several court actions were commenced in an attempt to overturn the agency's authorization. *See, e.g., United States* v. *United States,* 296 F. Supp. 853 (D. D.C. 1968). On March 3, 1970, the merger finally became effective by order of the Supreme Court. *United States* v. *Interstate Commerce Commission, (Northern Lines Merger Cases),* 396 U.S. 491 (1970).

After the issuance of the hearing examiner's recommended report and order, but while the merger proposal was still pending before the Commission, the rail carriers entered into an agreement with the BLE to establish the job protections which would be accorded the union membership fol-

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[2]In the Commisison's report denying the application, 328 I.C.C. 460 (1966), "it was found that the merger would result in a net loss of about 5,200 jobs on the applicant railroads, and that through the so-called bumping process, the number of employees affected would exceed that number." 331 I.C.C. 239, 276 (1967). For a general discussion of the "bumping process," which refers to seniority displacements caused by a re-arrangement or reduction in available work assignments, *see* Broth. Loc. Firemen & Eng. v. Southern Pacific Co. (T. & L.L.), 447 F.2d 1127, 1129-30 (5th Cir., 1971).

lowing the merger. This agreement, denominated the Merger Protective Agreement of Jun 29, 1965, guaranteed, *inter alia*, normal attrition and pre-merger wages for all locomotive engineers who had been employed on the predecessor lines. It also provided for subsequent negotiation by the carriers and the union of implementing agreements relating to the use of employees, rearrangement and changes in seniority districts, integration of seniority rosters in the consolidated seniority districts and other adjustments necessary to effect the merger.[3]

In January of 1966, the rail carriers and the BLE entered into a second agreement, known as Implementing Agreement No. 1, which contained, in pertinent part, certain provisions for the consolidation of seniority districts throughout the merged railroad system. The Implementing Agreement established five consolidated seniority districts. At issue in this case is the newly-formed Pacific Seniority

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[3]The Merger Protective Agreement provided, in pertinent part, for the presevation of employment and guaranteed monthly earnings based on test period earnings; for limitations on the obligation of an employee to take a position requiring a change in residence, without loss of earnings guarantees; and for increased moving expenses and other monetary benefits for an involuntary change in work location. In addition, all protected employees were automatically certified as being adversely affected by the merger without the necessity of having to prove direct adversity. The monthly monetary guarantee was to be automatically adjusted upward to compensate for general wage increases, and was to be independent of any outside earnings. Because the guarantee was based on a formula of average monthly earnings and average monthly hours worked, it would thus be possible for an employee to receive compensatory payments even though his actual wages exceeded the amount of his guarantee.

District.[4] It also provided that the consolidated seniority rosters for each of the five new districts were to be prepared on a percentage allocation basis — *viz.* on the basis of a ratio which contrasted the total engine hours and car miles within the newly consolidated district with the total engine hours and car miles in each of the former seniority districts so combined.

The Merger Protective Agreement and Implementing Agreement No. 1 were cancelled by the BLE, pursuant to their terms, following the Commission's initial decision to withhold its approval of the merger. However, in anticipa-

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[4]Prior to the merger, the individual predecessor lines had been divided into a number of operating divisions, each of which had a separate seniority roster for its employees. In conjunction with the merger, the BN was divided into five new seniority districts — Lake Superior District, Minnesota District, Montana District, Rocky Mountain District, and Pacific District — only the latter of which we are concerned with here.

The Pacific Seniority District, which extends from terminals at Troy, Montana and Paradise, Montana on the East to the Pacific Ocean in Washington and Oregon on the West, involved the merging of seven former seniority rosters:

(1) Great Northern Spokane Tenth Division (home terminal, Spokane) 174 men;
(2) Great Northern Eleventh Division (home terminal, Seattle) 189 men;
(3) Northern Pacific Tacoma East Division (home terminal, Auburn) 130 men;
(4) Northern Pacific Tacoma West Division (home terminal, Tacoma) 80 men;
(5) Northern Pacific Idaho East Division (home terminal, Spokane) 108 men;
(6) Northern Pacific Idaho West Division (home terminal, Pasco) 114 men;
(7) Spokane, Portland & Seattle System (various terminals) 188 men.

tion of receiving a more favorable ruling from the Commission on their petition for reconsideration, the carriers entered into a third agreement with the BLE on September 13, 1966. Under this third agreement, the two prior agreements were reinstated with several amendments, only one of which has particular relevance here.[5] As amended, the September 13, 1966 Agreement expressly provided that the interested General Committees of the BLE could agree to reject a percentage block allocation and establish a different method for consolidating the seniority rosters in their respective districts.[6] Absent objection by the various carriers, the method so chosen would then be incorporated into the post-merger collective bargaining agreement executed by BN and the BLE.

During the interval in which the BN merger was temporarily inactive — between the initially adverse decision

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[5]The pertinent amendment to Implementing Agreement No. 1 reads in full as follows:

> Section 3 of Attachment B of Implementing Aggreement No. 1 is amended to provide that in the event the interested General Committees agree on a different arrangement for an equitable consolidation of rosters for any of the new districts as outlined therein, and the New Company [BN] has no objection to such arrangement, then agreement will be entered into to cover such consolidation of rosters.

[6]Prior to the BN merger, each of the predecessor lines had a local organization of the BLE which generally, but not always, coincided with the operating divisions of the various railroads. Each such organization elected a Local Adjustment Committee, headed by a Local Chairman whose duties were primarily the negotiation of local matters with the carrier involved. The Local Committees then elected a General Committee of Adjustment represented by a General Chairman who was responsible for negotiating system-wide matters with the carrier.

of the Commission and the execution of the September 13, 1966 Agreement — the delegates to the BLE convention had convened and extensively revised, effective July 19, 1966, that portion of the BLE Constitution which dealt with mergers and other related transactions.[7] In conjunction with certain of these changes, the Grand Chief Engineer of the BLE assigned one of the union's officers to coordinate the intra-union activities associated with the proposed BN merger. Among his duties the officer was to assist the General and Local Chairmen in reaching a decision, pursuant to Standing Rule 35 and the September 13,

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[7]In addition to granting the Grand Chief Engineer considerable authority in the arrangements required by mergers, including a requirement that he "immediately assign an officer for the purpose of directing the committees in the handling to the best interests of the members involved. [sic]," Section 35(a)(I)(D) of the Standing Rules was amended to read in full as follows:

D. Seniority Districts

Should it be, in the judgment of the officer assigned and the General Chairmen in the best interest of the members affected as a result of a merger, etc., to consolidate and/or merge a Seniority District or Districts, the General Chairmen shall consult with the Local Chairmen to work out a merger of the Districts and seniority rosters which shall be made on an equitable basis, as follows:

In the preparation of seniority rosters to cover the Seniority Districts on an equitable basis, the General Chairman shall request the carrier to furnish promptly to him all statistical information such as, but not limited to, number of trains, car miles, train miles, and yard engine hours and/or inbound car count for uses in determining a proper ratio to govern the parties.

Should the General Chairman and affected Local Chairmen fail to agree, the matter shall be referred to the Grand Chief Engineer who shall make an investigation within thirty (30) days after which the Executive Committee of the G.I.D. [Grand International Division] shall make a determination which shall be final and binding.

1966 Agreement, as to the method by which seniority rosters would be consolidated in the newly-formed districts.

In August of 1967, following numerous meetings among all interested parties, four proposals were offered to the Local Chairmen[8] for their consideration; and, after further debate, a fifth and sixth proposal were added.[9] On October 17, 1968, the General Chairmen of the NP, GN and SP&S sent a joint letter to the Local Chairmen requesting that each indicate his preference as to the consolidation method which would be adopted in his district. Additional meetings were held, and the BLE's Executive Committee was consulted on a number of occasions regarding the various proposals. When the process was finally completed, the Local Chairmen in the Pacific District had voted to recommend the implementation of a date of hire method in their district.[10] It was this recommendation which was ultimately

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[8]In what was to become the Pacific Seniority District, there were seven local divisions of the three carriers involved. *See supra* at n. 4. These seven divisions were in turn represented by ten Local Chairmen — two GN Divisions reperesented by two Local Chairmen, four NP Divisions represented by five Local Chairmen, and one SP&S Divis. represented by three Local Chairmen.

[9]Although there appears to be some confusion as to the exact nature of the initial proposals — the district court characterizing them as a percentage block plan, a date of hire with a prior rights plan and a plan that included matching engineers according to their seniority ranking on the former rosters — and no express findings were made as to the fifth and sixth proposals, for present purposes the only relevant distinction is between a percentage block allocation and a date of hire method, however modified.

[10]Of the ten local chairmen, seven voted to recommend consolidation based on the engineer's date of hire as a fireman with a two-year restriction on the exercise of seniority rights unless, if a road engineer, the employee could not hold a similar job to that held prior

incorporated into the BN-BLE post-merger collective bargaining agreement, dated February 19, 1970.

The present action, charging a violation of the Railway Labor Act, 45 U.S.C. §151 *et seq.*, and the Interstate Commerce Act, 49 U.S.C. §1 *et seq.*, was instituted by a group of locomotive engineers employed on the merged BN.[11] In their prayer for relief, the plaintiffs sought a declaratory judgment that the consolidated seniority roster for the Pacific District and the February 19, 1970 collective bargaining agreement between BN and the BLE were illegal, null and void. In addition, injunctive relief was requested to prohibit BN and the BLE from implementing the agreement and thereby utilizing a date of hire consolidated roster.

Following a trial on the merits, the district court held that the BN-BLE agreement of February 19, 1970, and in particular those provisions specifying that the seniority rosters in the Pacific Seniority District were to be consolidated using the engineers' date of hire, was contrary to the "clear and unambiguous" language of Standing Rule 35 of the BLE Constitution and therefore void. The court also

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[10](continued)
to the merger, or, if a yard engineer, he could not hold an assignment in the same starting bracket. Two local chairmen voted to recommend that the rosters be merged on a percentage basis, the percent allocated to each former district determined by the number of men on its roster. Only one local chairman favored integration of rosters under a percentage block allocation method utilizing train miles and engine hours.

[11]The action was initially brought by seven named plaintiffs, all formerly in the GN Spokane Tenth Division, who were subsequently joined by 161 engineers in the GN Eleventh Division and 45 engineers from the NP Idaho West Division.

held that by interpreting its constitution to permit a date of hire consolidation the BLE had breached its statutory duty of fair representation under the Railway Labor Act, thus rendering the agreement and resulting seniority roster illegal and unenforceable. Finally, it held that in implementing the agreement the union had placed the plaintiffs in a "worse position with regard to work opportunity" in violation of Section 5(2)(f) of the Interstate Commerce Act. 49 U.S.C. §5(2)(f), the intent of the I.C.C. order approving the merger, 331 ICC 228 (1967), and the Merger Protective Agreement and Implementing Agreement No. 1 A declaratory judgment was entered, and an injunction issued which prohibited BN and the BLE from giving effect to the February 19, 1970 agreement or utilizing a date of hire consolidated roster in the Pacific District. For the reasons which follow, we reverse with directions that the injunction be dissolved and judgement entered for the defendants.

BREACH OF DUTY OF FAIR REPRESENTATION

Our analysis of whether the BLE has breached its statutory duty of fair representation under the Railway Labor Act, 45 U.S.C. 151,*et seq.*[12] begins, and in this instance ends, with our determination that the union's decision to implement a date of hire method for consolidating seniority rosters on the merged carriers was neither inequitable nor in violation of the "clear and unambiguous" language of the BLE Constitution.

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[12]The statutory duty of fair representation for bargaining representatives of railroad employees has been implied by the Supreme Court from Sections 1 and 2 of the Railway Labor Act, 45 U.S.C. §§151-52. *See* Steele v. Louisville & N.R. Co., 323 U.S. 192 (1944).

Although the district court made no express findings on whether a date of hire consolidation was equitable under the facts of this case, we believe the record before us is more than adequate to support this conclusion.[13] It has long been recognized that the use of such a method to integrate seniority rosters is an equitable arrangement for resolving the inevitable conflicts which arise whenever a merger occurs. *Humphrey* v. *Moore*, 375 U.S. 335, 347 (1964) and cases cited therein.[14] Provided that the use of this method was not foreclosed by Standing Rule 35 of the BLE Constitution, we thus view the implementation of a date of hire consolidation to be well within the "wide range of reasonableness [which] must be allowed a statutory bargaining representative in serving the unit it represents . . . ." *Id.* at 349

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[13]The various equities involved in the implementation of either a percentage block allocation or a date of hire consolidation have been extensively argued and fully briefed by the parties to this appeal. Given that the record has fully developed this issue, we feel that a remand would serve no function but to further delay the resolution of a dispute which has remained too long unsettled.

[14]In Humphrey, the Court held that a union's decision "to integrate lists upon the basis of length of service at either company [is] neither unique or arbitrary. On the contrary, it is a familiar and frequently equitable solution to the inevitably conflicting interests which arise in the wake of a merger . . . ." 375 U.S. at 347. The Court also quoted with approval the following statement:

> 'Integration of seniority lists should ordinarily be accomplished on the basis of each employee's length of service with his original employer . . . .'

375 U.S. at 348, n. 10, *quoting from* Kahn, Seniority Problems in Business Mergers, 8 *Ind. & Lab. Rel. Rev.* 361, 378 (1955).

The pertinent portion of Standing Rule 35(a)(I)(D), which has been set forth in full in the margin,[15] reads as follows:

> In the preparation of seniority rosters to cover the Seniority Districts *on an equitable basis,* the General Chairman shall request the carrier to furnish promptly to him *all statistical information such as, but not limited to,* number of trains, car miles, train miles, and yard engine hours and/or inbound car count *for use in determining a proper ratio to govern the parties.* (emphasis added).

In determining that the above-quoted language empowers the BLE to adopt a date of hire consolidation for integrating seniority rosters, we begin by recognizing the general proposition that:

> Trade union constitutions should be read in their living context. The interpretation or construction of the constitution and laws of a union is for the union, through its appropriate board or officers; and the courts will accept such interpretation, as long as there is no claim of fraud, and as long as the officer or body on which this power of interpretation has been conferred does not substitute legislation or amendment for construction, does not transgress the bounds of reason, common sense, or fairness, or act arbitrarily, or contravene public policy or the law of the land, or destroy the property or contractual rights of the members.

Wirtz v. *Local Union No. 125, International Hod Carriers B. & C.L.U.*, 270 F.Supp. 12, 16 (N.D. Ohio 1966), *quoting from* 51 *C.J.S.* Labor Relations §58 p. 686-87. Thus, in the present context, the central issue which must be resolved is whether the Rule is sufficiently broad so that the officers of the BLE could properly construe it as allow-

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[15] *See supra* at n. 6.

ing the General Chairman, once having considered the statistical information they receive from the carriers, to utilize a method of consolidation which yields an equitable result but which, in so doing, may either de-emphasize or entirely disregard certain of the expressly enumerated criteria.

Viewing the literal language of Standing Rule 35(a)(I)(D), we cannot say that it provides for an exclusive method of consolidation based upon a mandatory application of specific factors. As we see it, there are only two mandatory provisions in the Rule. First, there is the requirement that the General Chairmen, in determining the method which is to be implemented in a particular instance, must consider all relevant statistical data before rendering their decision. Second, there is the overriding requirement that the integration of seniority rosters must be accomplished in an equitable manner. Thus, under our construction of the Rule, the union has been given a wide range of flexibility which permits it to adopt a variety of different consolidation methods depending upon the varying situations with which it may be confronted and the peculiar interests of the employees who will be affected. In reaching its decisions, the union may emphasize certain criteria — such as date of hire — over others and it may also reject any of the data, whether it be expressly enumerated or not, provided that the consolidation method which is ultimately chosen proves to be an equitable one.

A review of the legislative history underlying the passage of Standing Rule 35 further bolsters our conclusion that the BLE was not "locked in" to a single method of consoli-

dation. The discussion surrounding the adoption of the Rule does include statements which, if read in isolation, might indicate that some form of percentage block allocation was envisioned by the delegates to the BLE Convention.[16] However, these statements must be considered in the context of the entire floor debates.[17] When viewed as a whole, the legislative history clearly suggests that the primary purpose of the Rule was to give the union officers great flexibility in formulating methods to integrate seniority rosters; that no single method was intended to be prescribed; and that an employee's date of hire was one of the elements which was properly to be considered in determining which method would be equitable in any given case.[18]

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[16]For example, during the course of the proceedings Assistant Grand Chief Engineer Birrell stated that:

> . . . When you consolidate a roster in the mergers we are making today, you have to use the work that is available to that particular seniority district. In other words, *you take the mechanics here that are in this particular section, get all of your data from the railroad and the seniority rosters are then based on the work that is there.*
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> * * *
>
> Now, in order to get guaranteed earnings and/or employment, you have to make certain changes, *and the only way you can consolidate a seniority roster with four or five railroads or ten railroads is by doing it on the basis of proration of work that was there on that particular track.* (emphasis added).

II Grand International Brotherhood of Locomotive Engineers First Quadrennial Convention Proceedings 1234-35 (1966) (hereinafter "Convention Proceedings")

[17]For the entire floor debates surrounding the passage of Standing Rule 35(a)(I)(D), *see* II Convention Proceedings at 1229-36.

[18]Thus, the Chairman of the BLE's Constitution and By-laws Committee, which submitted the resolution that was to become Standing Rule 35, stated in reference to a query concerning the enumerated criteria:

Nor does the precedent which deals with Standing Rule 35 undercut or in any way limit our belief that the Rule should be broadly construed. For example, in *Price* v. *Seaboard Coastline Railroad Co.*, 332 F.Supp. 1093 (N.D. Ala., 1970), *aff'd per curiam*, 449 F.2d 1371 (5th Cir., 1971), a case in which, *inter alia*, the BLE was charged with having breached its duty of fair representation because of certain limitations imposed on the post-merger exercise of seniority rights the agreement then before the court had provided for seniority dovetailing on two independent bases. Prior to the merger, one of the lines had maintained separate seniority rosters for its yard and road engineers. In order to consolidate these intra-line rosters, the agreement between the union and the surviving carrier provided for a modified date of hire dovetailing.[19] The resulting consolidated roster was then integrated with the

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[18](continued)

> Now, these are *some* of the factors. We say not limited to that. *There can be many other factors* that nobody would be able to forsee, at this minute, which would be confronting you. (emphasis added).

II Convention Proceedings at 1231. And in response to the colloquy which ensued following Assistant Grand Chief Engineer Birrell's statement, quoted *supra* at n. 14, the Chairman stated that:

> . . . What we are talking about here is the consolidation of rosters, and in that consolidation of rosters I am told that the date *you hire on the railroad will count on these railroads when rosters are consolidated.* (emphasis added).

Id. at 1235.

[19]This portion of the agreement provided that the two seniority rosters were to be consolidated on the basis of the individual's date of hire as a fireman, except where that date would "permit the individual to 'run around' and engineer having a higher existing rank on the engineer seniority roster." 332 F.Supp. at 1097.

seniority rosters in effect on each of the other merged carriers pursuant to a modified percentage block allocation formula utilizing four specific statistical elements.[20]

In its findings of fact, the district court first determined that:

> As to each former seniority district, its equity in the work of the new consolidated seniority district was determined on the basis of its percentage of the total work performed in the former districts, as established by consideration of the four elements prescribed. Section 35 of the Standing Rules of the BLE Constitution, *which section sets forth the exclusive procedures governing the handling of merger related problems, including seniority, provides for the use of these four elements in determing the proper ratio for consolidating seniority rosters on an equitable basis in the event of merger.* (emphasis added).

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[20]The four elements which were used in the overall consolidation were: (1) Job starts of all engineers within each former seniority district; (2) Miles paid for, including enginee hours for all engineers within each former seniority district; (3) Earnings for all engineers within each seniority district; and (4) Number of men on the January 1, 1966, and July 1, 1966, seniority rosters of each former seniority district. As outlined by the district court the consolidation was effected in the following manner:

> In transferring the names from the former seniority rosters of of engineers to the consolidated rosters on each of the six consolidated districts, each individual was inserted thereon in accordance with the positions delegated to his former district on the basis of its equity. As between the engineers as a group on the former district, each individual was placed thereon in relation to his relative position to the other engineers in the former district; that is, the individual's date of hire as a fireman was used except where said date would permit the individual to 'run around' an engineer having a higher existing rank on the engineers' seniority roster for his former district. In view of the percentage block formula, the date of hire as a fireman was not relevant as to the position on the consolidated roster between individuals from different seniority districts.

322 F.Supp. at 1097.

332 F.Supp. at 1097. The court then went on to hold that there had been no breach by the union of its duty of fair representation, primarily on the ground that each engineer had been placed in "the same relative standing or position in regard to work opportunity as he was in prior to the merger."[21] *Id.* at 1097. *See also, Cole* v. *Seaboard Coastline Railroad Co.*, 65 C.C.H. Lab. Cases, ¶11,567 (E.D. Va. 1970), *aff'd*, 64 C.C.H. Lab. Cases, ¶11,499 (4th Cir., 1971).[22]

In *Witherspoon* v. *Grand International Brotherhood of Locomotive Engineers*, 194 S.E.2d 399 (S. Car. 1973) the Supreme Court of South Carolina dealt with another attack upon the same merger agreement which had been litigated in *Price*. The appellants in *Witherspoon*, however,

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[21]It was particularly interesting to note at this point in our analysis that, of the four elements used in the consolidation, only one was specifically enumerated in Standing Rule 35. In addition, the ratio which was implemented did not utilize all of the data which the Rule required the General Chairman to obtain.

[22]In *Cole*, the district court was faced with another dispute arising from the agreement which had been before the court in *Price*. The two cases differed in the particular consolidated seniority district at issue, and in the absence of an initial date of hire consolidation on one of the lines. The only reference in the opinion to Standing Rule 35 was as follows:

> As to each former seniority district, its equity in the work of the new consolidated seniority district was determined on the basis of its percentage of the total work performed in the former districts, as established by consideration of the four elements prescribed. Section 35 of the Standing Rules of the BLE Constitution *provides for the use of these four elements* in determining the proper ratio for consolidating seniority rosters on an equitable basis in the event of merger. (emphasis added).

65 C.C.H. Lab. Cases at 20,811.

contended that the agreement was invalid on the ground that the union could show no rational basis for its adoption of a percentage block allocation. They further contended that the only equitable method for consolidating the seniority rosters would have been one based solely upon the engineers' date of hire. In resolving the issue then before it, the court first noted that:

> Section 35 of the standing rules of the BLE Constitution, which sets forth the procedures governing the handling of merger-related problems, including seniority, *contemplates elements other than date of hire in determining the method and proper ratio for consolidating seniority rosters on an equitable basis* in the event of merger. (emphasis added).

194 S.E.2d at 402. The court then went on to hold that:

> The record fairly indicates that the BLE and Seaboard entered into the agreements with the good faith and honest belief that, considering all members, *dovetail percentage blocking was the most equitable method* to consolidate seniority rosters; and that the dovetail percentage blocking method *was one of a number of fair and reasonable methods available.* (emphasis added).

Id. at 403.

Contrary to the assertions of appellees, we do not read these opinions as establishing that Rule 35 mandates a percentage block allocation in the consolidation of seniority rosters. In both cases, the courts' overriding concern was with whether the method of consolidation actually implemented by the union had resulted in an equitable solution to what often proves to be an extremely difficult type of

problem.[23] In each instance, the court resorted to the language of the Rule primarily as an aid in determining the central issue of whether the consolidation had been equitable; and in both the court was careful to avoid becoming enmeshed in the question of whether, and to what extent, the BLE was limited in the factors it could apply.[24] The references to Standing Rule 35 having been made in the context of demonstrating the equity of a particular method, we are not willing to accept the argument that these cases foreclosed other methods of consolidation which might have proven equally equitable but which were not as clearly within the express language of the Rule.

Having determined, contrary to the court below, that

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[23]The very multiplicity of conflicting contentions raised in *Price, Cole* and *Witherspoon* only highlight the virtual impossibility that any solution to the consolidation problem will be acceptable to all the parties affected. As has been noted by the Supreme Court:

> Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953).

[24]For example, the court in *Witherspoon* expressly refused to rule on the issue of whether the BLE had violated Standing Rule 35 in implementing the consolidation. Having found that the consolidation was within the "wide range of reasonableness granted bargaining agents," 194 S.E.2d at 403, and thus not a breach of the union's duty of fair representation, the court went on to hold that even if a constiutional violation had occurred it would not have the effect of nullifying the collective bargaining aggreement between the union and the merged carrier. 194 S.E.2d at 404.

Standing Rule 35 does not require the BLE to utilize a percentage block allocation in consolidating its seniority rosters, we are thus not prepared to say that the union has breached its statutory duty of fair representation. *See, e.g., Vaca* v. *Sipes,* 386 U.S. 171 (1967); *Humphrey* v. *Moore,* 375 U.S. 335 (1964); *Ford Motor Company* v. *Huffman,* 345 U.S. 330 (1953). While it may be that another method for consolidating the rosters at issue here would have satisfied a larger number of engineers affected by the merger, without more this Court should not substitute its views for those of officials elected by the employees to represent them in such matters.

INTERSTATE COMMERCE ACT VIOLATION

In its conclusions of law, the district court held that:

> As a result of the Agreement dated February 19, 1970 (Joint Exhibit 7) and the resulting engineers' seniority roster . . . the plaintiffs have been placed in a worse position with regard to work opportunity . . . in violation of . . . Section 5(2)(f) . . . and of the intent of the I.C.C. order approving the merger, the Merger Protective Agreement *and Implementing Agreement No. 1* . . . . (emphasis added).

Although supported neither in its findings of fact nor by anything this Court has managed to glean from the record, the only possible ground for such a holding would be if the Commission considered the two above-mentioned agreements, but not the September 13, 1966 Agreement, in the discharge of its statutory duty under Section 5(2)(f) of the Interstate Commerce Act, 49 U.S.C. §5(2)(f).[25] While

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[25]Section 5(2)(f) of the Interstate Commerce Act, 49 U.S.C. §5(2)(f), reads in full as follows:

> (f)As a condition of its approval, under this paragraph, of

logic and the record would both seem to indicate that such a construction of the facts may have been erroneous—i.e. that the Commission had before it either all three of the pre-merger agreements or solely the initial Merger Protective Agreement[26] — it is our view that even if the situation

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[25](continued)

any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interest of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which the employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provision of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

[26] Our examination of the record indicates that the only agreement actually before the Commission was the Merger Protective Agreement. For example, in its Report and Order the Commission referred to the "*agreement*" and noted as follows:

> The *agreement* recognizes the right of [BN] to transfer work throughout the merged system and *contemplates* the consolidation and extension of seniority rosters and seniority districts, on an equitable basis, pursuant to implementing agreements providing for the use of employees and the allocation and rearrangement of forces. (emphasis added).

331 I.C.C. at 278. The terms of the implementing agreements themselves are neither mentioned nor discussed during the course of the Commission's analysis of employee protections. *See* 331 I.C.C. at 276-79.

However, assuming that the Commission did consider the parties' subsequent agreements, it would seem highly improbable that it did

was as the district court seems implicitly to have held the plaintiffs below would be entitled to no relief under the Act.[27]

If either of the alternative factual contexts actually pertained, as the present record would lead us to believe, then the issue before us would be capable of ready disposition and we would be forced to overrule the district court.[28]

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[26](continued)
not have the September 13, 1966 Agreement before it. The carriers' petition for reconsideration was not granted until January 4, 1967 and hearings did not commence until March of that year, 331 I.C.C. at 234. The Commission's order and report, which approved the merger, was not issued until November 30, 1967. In addition, at the time the petition was granted the Merger Protective Agreement and Implementing Agreement No. 1 had vitality only through, and to the extent not amended by, the later agreement. Thus, it would appear unlikely that the Commission would consider the first implementing agreement without also considering the second.

[27]While normally our reaction in a situation such as this would be to remand the case for further findings of fact, we do not feel that such a course of action is necessary here. In our view, regardless of the circumstances which obtained, the plaintiffs would not be entitled to relief under Section 5(2)(f).

[28]If the Commission considered solely the Merger Protective Agreement, then a date of hire consolidation would have violated neither the Act, the intent of the Commission's order, nor the Agreement itself. In addition to establishing wage and attrition guarantees, this agreement provided no more than that seniority consolidation would be affected on an "equitable basis." As we have already held that the use of an employee's date of hire was an equitable method for integrating the seniority rosters in the Pacific District, the only issue would be whether the uses of an equitable method could nevertheless violate Section 5(2)(f) by placing some employees in a "worse position with respect to their employment." Given the type of protections with which that Section is concerned, *see infra* at 00, we would find such an argument to be devoid of merit.

However, if the Commission did consider Implementing Agreement No. 1., but not the September 13, 1966 Agreement, then the issue becomes more complex. The union's integration of seniority rosters based on an employee's date of hire would not have directly violated the intent of the Commission's order — the consolidation being equitable

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[28](continued)

If the Commission considered both of the subsequent agreements, then there couuld similarly have been no violation of the Act, the Commission's order, or Implementing Agreement No. 1. The September 13, 1966 Agreement did not require a specific method of consolidation but provided, contrary to the earlier agreement, that the union could adopt whatever method its General Chairmen should choose. In addition, the Commission's approval would have consituted a determination that both the percentage block and the machinery for implementing a different method were "fair and equitable." Thus the issue would again become whether the use of an equitable method when coupled with wage and attrition guarantees, could be in violation of the "worse position" clause of Section 5(2)(f). As we have indicated, we would not accept such a contention.

In attempting to frame their argument on the issue of a violation of the Commisison's order, appellees attempt to make much of the language requiring that:

> . . . no employee is to be deprived of his employment status or placed in a worse position with respect to compensation, rules governing working conditions, fringe benefits or rights and privileges pertaining thereto at any time during such employment.

331 I.C.C. at 277-78. They would have us read "employment status" as a requirement that every employee maintain the identical seniority rights as he had enjoyed prior to the merger. However, such a reading would necessarily require a "job freeze" and as a practical matter render *any* consolidation a violation of the Commission's intent. As we read the language, it refers merely to the status of being employed and the attrition guarantees contained in the Merger Protective Agreement. Any broader reading would take such a requirement beyond the intendment of the Act. *See infra* at 00.

and the Commission not having expressly mandated that a particular method be used[29] — however it would violate the terms of Implementing Agreement No. 1. Thus, the issue before us would be the extent to which BN and the BLE would be bound by the terms of their pre-merger agreements where the Commission has reviewed those agreements prior to its approval of a merger. In particular, we must determine the extent to which a merged carrier and its employees' collective bargaining representative will be bound by those provisions in their pre-merger agreements which deal with matters not directly related to the compensation of discharged or displaced employees — here, the relative post-merger seniority rights of retained employees — in those situations where the Commission has adopted the agreements in discharge of its statutory duty under Section 5(2)(f).

For purposes of this analysis, the first case to clarify the scope and effect of Section 5(2)(f) was *Railway Labor Executives' Assn.* v. *United States*, 339 U.S. 142 (1950). In *RLEA*, the Court was confronted with the issue of whether the four year period contained in the second sentence of Section 5(2)(f) had established a ceiling on the Commission's authority to require protections for employ-

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[29]It is also arguable that use of a date of hire method could not have violated the intent of the Commission's order because at that time the Commission's view of the "notwithstanding" proviso of Section 5(2)(f) was such that the existence of the agreements removed the duty to provide *any* protection for employees covered by those agremeents. 331 I.C.C. at 278. *See* Norfolk & Western Ry. Co. v. Nemitz, 404 U.S. 37 (1971); Div. No. 14, Order of Railroad Tel. v. Leighty 298 F.2d 17, 18 (4th Cir., 1962). *cert. denied* 369 U.S. 885 (1962).

ees affected by a consolidation or merger. In holding that the Commission's powers were not so limited, the Court began by examining the legislative history surrounding the enactment of the statute.[30] After a review of history from which the initial sentence of the Section evolved, Mr. Justice Burton first concluded that:

> If this provision which later became the first sentence of §5(2)(f), now stood alone as it did then, the Commission unquestionably would have the power to grant at least as much relief to employees as it had under §5(4)(b).

339 U.S. at 150.[31] He then went on to reject the argument that:

> . . . the second sentence of §5(2)(f), which was inserted soon thereafter, amount[ed] not only to an additional provision for the protection of labor, but also to a limitation upon the discretion vested in the Commission by the first sentence.

Id.[32] In so doing, Mr. Justice Burton placed heavy reliance

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[30]For a general synopsis of the legislative history of Section 5(2)(f), see the Appendix to the Court's opinion in St. Joe Paper Co. v. Atlantic Coast Line R. R., 347 U.S. 298, 315 (1953).

[31]Prior to the passage of the Transportation Act of 1940, which incorporated Section 5(2)(f) into the Interstate Commerce Act, there had been no statutory provision specifically requiring that protections be accorded employees adversely affected by railroad consolidations and mergers. The precurser of this provision, which is referred to in the Court's opinion, was Section 5(4)(b) which authorized the Commission to approve such transactions "upon the terms and conditions . . . found to be just and reasonable." 48 Stat. 217, *See generally* Railway Labor Executives' Assn. v. United States, *supra* at 146-48.

[32]In its opinion, the Court expressly held:

> . . . that the time limit in the second sentence now applies to

not only on the literal language of the statute, but also on an analysis of the introduction and subsequent modification of a legislative proposal known as the Harrington amendment.[33]

However, it was not until some eleven years later that the Court in *Brotherhood of Maintenance of Way Employees* v. *United States,* 366 U.S. 169 (1961) finally established the *type* of protections which were encompassed by Section 5(2)(f).[34] Squarely faced with the issue of whether monetary compensation for discharged or displaced employees

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[32](continued)
it and to it alone. As thus limited, that sentence adds a new guaranty of protection for the interests of employees, *without restricting the Commission's power to require greater protection as a part of a fair and equitable arrangement.* This serves the purpose of the sentence to increase, rather than to decrease, the protective effect of the paragraph. (emphasis added).

339 U.S. at 153-54.

[33]The Harrington amendment, which was to be incorporated into Section 5(2)(f) immediately following the first sentence, read in full:

> *Provided, however,* that no such transaction shall be approved by the Commission if such transaction will result in unemployment or displacement of employees of the carrier or carriers, or in the impairment of existing employment rights of said employees.

84, Cong. Rec. 99,882 (1939). For a discussion of the introduction and subsequent rejection of this proviso, which would clearly have required a "job freeze," *see* Railway Labor Executives' Assn. v. United States, *supra* at 150-53; Brotherhood of Maintenance of Way Employees v. United States, 366 U.S. 169, 174-77, (1961).

[34]In distinguishing its prior opinion in *RLEA, supra,* the Court stated that:

> The *RLEA case was not concerned with the types of protection to be afforded employees* for the first four years following the merger; the only question was whether compensatory benefits

satisfied the congressional mandate embodied in the Act, the Court rejected the contention that the Section contemplated a "job freeze" for employees on the predecessor lines. As the Court saw it, Section 5(2)(f) was not concerned with maintaining employment status, *per se*, but rather with insuring that those employees affected by a merger would not be placed in a "worse position" with respect to their compensation for, at a minimum, the statutory four-year period.[35]

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[34](continued)

could be extended beyond four years, and the Court held they could. (emphasis added).

U.S. at 178-79.

[35]In reaching this result, Mr. Chief Justice Warren thoroughly reviewed the evolution of the Section, with particular emphasis on the Harrington amendment.

> First, it is clear that there were two alterations made in the substance of the original Harrington amendment: Not only was a four-year limitation imposed, but also general language of imprecise import was used in substitution for language clearly requiring 'job freeze' such as appeared in the original amendment and the 1933 Act. Secondly, the representatives whose floor statements are entitled to the greatest weight are those House members who had the last word on the bill — the House conferees who explained the final version of the statute to the House at large immediately prior to passage — rather than those Congressmen whose voices were heard in the early skirmishing but who did not participate in the final compromise. Finally, although it might be an overstatement to claim that their remarks are dispositive, the statements the House conferees gave in explanation of the final version *clearly reveal an understanding that compensation, not 'job freeze', was contemplated.* (emphasis added).

366 U.S. at 175-76. He then went on to cite a series of contemporaneous interpretations of the Statute which supported the Court's holding. Thus, for example, the fact that the Commission had adopted an identical construction in its next annual report, I.C.C. 5th Ann. Rep. 60-61, and had subsequently imposed ". . . compensatory conditions, and only compensatory conditions, in proceed-

The final Supreme Court case which we must consider is *Norfolk & Western Railroad Co.* v. *Nemitz*, 404 U.S. 37 (1971). In *Nemitz*, the Court dealt with the validity of a post-consolidation collective bargaining agreement that had substantially abrogated certain compensation/attrition protections guaranteed employees under a prior agreement which had been adopted by the Commission in discharge of its Section 5(2)(f) duty.[36] The Court, in an opinion by Mr.

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[35](continued)
ings involving §5 transactions . . .", *Id.* at 177, added great weight to the Court's view.

[36]The facts surrounding the initial agreement in *Nemitz* were as follows:

> In anticipation of the 1964 consolidation, petitioner entered into an agreement with 19 labor organizations for protection of the employees of the several railroads coming into the consolidation . . . Petitioner agreed to employ 'all employees of the lines involved *with the guarantee that they wil not be adversely affected in their employment* as a result of the proposed transactions or for any reason other than furloughs due to seasonal requirements or a decline in the volume of traffic or revenue. 324 I.C.C. 1, 89 (emphasis added).
>
> Each employee was to receive a monthly supplement to his post-consolidation monthly earnings equal to the excess, if any, of his average monthly compensation for the 12 months prior to the consolidation in which he had performed services.

404 U.S. at 39. Later in the opinion, Mr. Justice Douglas described the effect of the subsequent agreement on junior employees in the following terms:

> The 1965 agreement obviously placed these junior employees "in a worse position with respect to compensation," as those words are used in the pre-consolidation agreement. For they no longer could work on any part of the former Toledo Division except the Sandusky Line and their prior compensation, reflecting in part the work on other parts of the Toledo Division, was no longer a measure of the 'compensation' to which they were entitled under the pre-consolidation agreement. For those whose historical average monthly earnings were so slight that they were now on unemployment insurance, the result would be

Justice Douglas, refused to accept the argument that the final sentence of Section 5(2)(f) — the "notwithstanding" proviso — had relieved the Commission of *any* duty to review the adequacy of protective provisions contained in the post-consolidation collective bargaining agreement. As Mr. Justice Douglas analyzed the problem:

> We reviewed the history of §5(2)(f) in *Railway Executives' Assn.* v. *United States,* 339 U.S. 142, and said that 'one of its principal purposes was to provide mandatory protection for the interests of employees affected by railroad consolidations.' *Id.,* at 148. That 'mandatory protection' can be accorded by terms provided by the Commission, or, as is more likely, by provisions of a collective agreement which the Commission adopts or approves as adequate for a minimum of four years (as required by the second sentence) or longer (as allowed by the first sentence) if the Commission so provides, *Id.,* at 154. *The purpose of §5(2)(f) was not to freeze jobs but to provide compensatory conditions. Brotherhood of Maintenance of Way Employees* v. *United States,* 366 U.S. 169, 175-176. In that case we noted that the Commission has consistently followed that practice 'in over 80 cases, with the full support of the intervening brotherhoods.' *Id.,* at 177. And the Commission over and over again has adopted the set of labor conditions contained in collective agreements in discharge of its duty under §5(2)(f). *See Gulf, M. & O.R. Co. Purchase,* 261 L.C.C. 405, 434; *Erie R. Co. Trackage Rights,* 295 I.C.C. 303, 305; *Deleware, L. & W. R. Co. Trackage Rights,* 295 I.C.C. 743, 755-756.
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> When there is a collective agreement and the Com-

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[36](continued)

much more drastic than 'normal attrition,' which the Commission said was the only way under the protective conditions by which jobs could be eliminated.

Id. at 44.

> mission, as here, adopts or approves it, the 'notwithstanding' sentence of §5(2)(f) is not, as suggested, read out of the Act. *The collective agreement then becomes a 'condition' of the Commission's 'approval' of the consolidation under the first sentence of §5(2)(f) and its provisions are deemed by the Commission to be 'a fair and equitable arrangement to protect the interests' of the employees within the meaning of the first sentence.* Thus, the significance of the 'not withstanding' proviso is that it provides the machinery for the terms of a pre-merger collective agreement and thus supplies the minimum measure of fairness required under the first sentence of §5(2)(f). (emphasis added).

404 U.S. at 42-43. He then went on to approve the holding of the Court of Appeals that:

> An agreement made pursuant to the last sentence of Sec. 5(2)(f) may vary the protections afforded by the I.C.C. order, but it *may not substantially abrogate employees' rights grounded in an I.C.C. order.* (emphasis added).

404 U.S. at 44, *quoting from* 436, F.2d at 848.

In the instant case, all locomotive engineers who would be affected by the BN merger were guaranteed normal attrition and pre-merger wage levels. Nor can it be argued that these protections have been abrogated by the BN-BLE post-merger collective bargaining agreement. Thus, the issue before us it whether the broad language of *Nemitz*, delineating the effect that Commission approval of pre-merger agreements will have upon subsequent collective bargaining, is to be held applicable to all terms in the pre-merger agreement or, as was the case then before the Court, only to those terms dealing directly with compensatory protection for displaced

or discharged employees.[87] It is our belief that the language in *Nemitz* should properly be limited to the context which engendered it — *viz.* to those matters which have a direct bearing on insuring that employees who may be adversely affected as a result of a merger or consolidation are compensated in a "fair and equitable" manner. We thus hold that, even assuming the Commission had before it the Merger Protective Agreement and Implementing Agreement No. 1, but not the September 13, 1966 Agreement, those provisions in the Agreements which established the method for consolidating seniority rosters would not be binding upon the parties in their post-merger collective bargaining activities.

We reach this result on two interdependent grounds. First, because Section 5(2)(f) was designed ". . . not to freeze jobs but to provide compensatory conditions," *Norfolk & Western Railroad Co.* v. *Nemitz, supra* at 42, the lifetime guarantees of wages and normal attrition given to employees in this case have provided the full measure of protection which that Section was meant to provide. Second, we feel that a contrary result would have the effect of

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[87]We note at this point in our analysis that the Third Circuit has apparently adopted the position that when Section 5(2)(f) speaks of protecting the interests of "employees affected" it refers solely to those employees whose jobs are lost and/or whose relationship with the carrier is severed, rather than to all employees who suffer the possibility of displacement by reason of the transaction. *See* Clemens v. Central R. Co. of New Jersey, 264 F.Supp. 551, 565-68 (E.D. Penn. 1967) *rev'd on other grounds* 399 F.2d 825 (3d. Cir., 1968), *cert. denied,* 393 U.S. 1023 (1969). While we find the reasoning of the court in *Clemens* to be persuasive, given our holding in the instant case we deem it unnecessary to decide whether we would adopt such a position in the future.

severely emasculating the collective bargaining process both by eliminating the very flexibility upon which such bargaining depends and by interjecting the Interstate Commerce Commission and/or the courts into matters of substance which have historically been beyond their province, *see, e.g., Chicago & North Western Railroad Co.* v. *United Transportation Union*, 402 U.S. 570, 579 n. 11 (1971).[88]

We do, however, recognize the possibility that under certain circumstances provisions in a pre-merger agreement which do not speak directly to compensation may nevertheless be so intimately related to the compensatory protections guaranteed employees as to require their inclusion in a post-merger collective bargaining agreement. But this is not such a case. Here, there has been no abrogation of "the standard of 'compensation' covered by the [pre-merger] agreement which had come under the protective order of the Commission," *Norfolk & Western Railroad Co.* v. *Nemitz, supra* at 44-45. Nor can an argument be made, given the lifetime guarantees accorded, that over the term of their employment the relative seniority rankings of retained employees will have any bearing on their ability to work at a level of compensation at least as great as that which they enjoyed prior to the merger.

The judgment below is, therefore, REVERSED.

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[88]For a general discussion of the ramifications which a broad reading of the Court's opinion in *Nemitz* might create, *see Norfolk & Western Ry. Co., v. Nemitz, supra* at 45-54 (Blackmun, J. dissenting).

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CARL LATURNER, *et al.*, *Appellees*, v. BURLINGTON NORTHERN, INC., and BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *Appellants.*	No. 72-1576 ORDER

Before: CHAMBERS and SNEED, Circuit Judges, and BURNS*, District Judge.

Appellees Petition for Rehearing is hereby denied.

*Honorable James M. Burns, District Judge, Western District of Oregon sitting by designation.